In the Supreme Court

OF THE

United States

OCTOBER TERM, 1947

No. 317

NICK DELIS,

Petitioner,

vs.

GEORGE P. PAPPAS, EVANGELINA PAPPAS and GUS KAVALOS, doing business under the fictitious name of Pappas & Co.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal of the State of California, in and for the Fourth Appellate District.

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STATEMENT OF THE CASE.

There is no real dispute as to the facts in this case. The parties made a written contract reading as follows:

"Mendota, California. September 1, 1945.

"CONTRACT

"A contract between Pappas & Company, Mendota, California, Fresno County, hereinafter known as the party of the first part, and Nick Delis, 450 Front Street, San Francisco, California, hereinafter known as the party of the second part.

"Party of the second part agrees and binds himself to buy from the party of the first part 40 acres of onions, more or less, for the contract price of $16,000.00, grown on Section 18-14-14, Fresno County, grown in the 1945 season.

"The payments to be made by the party of the second part are as follows: $1000.00 at the signing of this contract, $7000.00 when picking starts, and the balance as the party of the first part may demand.

"Pappas & Company, by, By George B. Pappas, Party of the First Part. Nick Delis, by Nick Delis, Party of the second part."

(Transcript of Record, pages 7 and 29.)

Petitioner paid $1000.00 when the agreement was executed. He took possession of the field, harvested and removed the onion crop over a month later. However, petitioner has refused to pay the balance of $15,000.00 payable under the contract. (Transcript of Record, page 30.)

Respondents brought this action for the balance payable under the contract. At the trial no evidence was offered by petitioner. It is admitted that the $15,-

000.00 has not been paid and petitioner's only defense is the claim that the agreement was illegal and void on its face as being in violation of the Emergency Price Control Act of 1942, as amended, and certain regulations adopted thereunder.

The judgment of the Superior Court of the State of California, in and for the County of Fresno, for respondents and against petitioner was affirmed by the District Court of Appeal, State of California, Fourth Appellate District, and a hearing was denied by the Supreme Court of the State of California.

Petitioner, on page 7 of his petition for writ of certiorari, states that the federal question presented is as follows:

> "Is a contract which was entered into in violation of a price regulation adopted by the federal Price Administrator pursuant to the powers conferred upon him by the Emergency Price Control Act, enforcible in the State Courts?"

Respondents believe this to be an inaccurate statement of the question.

Respondents believe first, that the provisions of the Emergency Price Control Act of 1942, as amended, and Revised Maximum Price Regulation 271 are not applicable to the contract and that the agreement cannot in any way be construed to be a violation of the act and regulation, and second, that even if the act and regulation were applicable, the record is wholly devoid of any evidence which would show a violation of the act or regulation.

ARGUMENT.

I.

THE DISTRICT COURT OF APPEAL HAS NOT ERRED IN ITS CONSTRUCTION OF THE PURPOSE AND EFFECT OF THE REGULATION OF THE OFFICE OF PRICE ADMINISTRATION.

The decision of the District Court of Appeal, State of California, Fourth Appellate District, is set forth on pages 35 et. seq. of the Transcript of Record, and is reported in 79 A.C.A. 443. This decision sets forth fully and clearly the reasons why the transaction involved did not violate the provisions of the Emergency Price Control Act and Revised Maximum Price Regulation 271. It is self-explanatory and in the interest of brevity no further elaboration is necessary.

The cases cited by petitioner upon page 11 of his petition need not be discussed since they are not in point. The question in the instant case was not before the Court in any of them, and nothing contained in them can be advanced as authority for the issues raised in the present case.

II.

EVEN IF EMERGENCY PRICE CONTROL ACT OF 1942 AND REVISED MAXIMUM PRICE REGULATION 271 WERE APPLICABLE, THERE WAS NO EVIDENCE FROM WHICH THE CONTRACT COULD BE FOUND ILLEGAL.

As was aptly stated in the decision in this case by the District Court of Appeal, State of California, Fourth Appellate District:

"Not only does it not appear upon the face of this transaction that it was illegal and void, but there is no evidence in the record from which the court could have found that the contract was illegal or that it was in violation of these regulations. The appellant harvested and removed these onions and is the only one who knew or could have produced evidence as to the quantity of onions which was eventually produced and taken by the appellant by virtue of this sale. He failed to produce any evidence as to this fact, and all presumptions are in favor of the judgment and not against it. For anything that here appears the quantity of onions produced and taken by the appellant may have been such that the contract price agreed upon was at a rate far below the maximum prices provided for in RMPR 271, assuming that the provisions of that regulation were applicable and material here.

"The plain situation is that the appellant has failed to meet the prima facie case made by the respondents and has failed to sustain the burden of proof resting upon him. (Basler v. Sharp & Fellows Co., 73 Cal. App. 2d 480; Balfour v. Heuer, 77 A.C.A. 236; Thacker v. American Foundry, 78 A.C.A. 72; Gelb v. Benjamin, 78 A.C.A. 970." (Transcript of Record, page 40.)

It is a rule of interpretation that where a contract is fairly open to two constructions, one of which is lawful and the other unlawful, the former must be adopted.

Hobbs v. McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940.

As was pointed out in *Steele v. Drummond,* 275 U. S. 199, 48 S. Ct. 53, 72 L. Ed. 238:

> "* * * It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. And it is a matter of great public concern that freedom of contract be not lightly interfered with. Baltimore & Ohio Southwestern Ry. v. Voigt, 176 U. S. 498, 505, 20 S. Ct. 385, 44 L. Ed. 560. The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. 1 Story on Contracts (5th Ed.) #675; Pope Mfg. Co. v. Gormully, 144 U. S. 224, 233, 12 S. Ct. 632, 36 L. Ed. 414. It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. Atlantic Coast Line R. R. Co. v. Beazley, 54 Fla. 311, 387, 45 So. 761; Barrett v. Carden, 65 Vt. 431, 433, 26 A. 530, 36 Am. St. Rep. 876; Richmond v. Dubuque & Sioux City R. R. Co., 26 Iowa 191, 202; Egerton v. Earl Brownlow, 4 H. L. Cas. 1, 122; Richardson v. Mellish, 2 Bing, 229, 242, 252. Detriment to the public interest will not be presumed, where nothing sinister or improper is done or contemplated. Valdes v. Larrinaga, 233 U. S. 705, 709, 34 S. Ct. 750, 58 L. Ed. 1163."

See also *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,* 276 U. S. 518, 48 S. Ct. 404, 72 L. Ed. 681.

An illegal contract will not be presumed but must be established by the evidence.

Thornton v. Bank of Washington, 28 U. S. 36.

The burden of the showing of the illegality is upon the party asserting it.

U. S. v. Grace Angelical Church, 132 F. (2d) 460.

The petitioner failed to sustain the burden of pleading and proving the illegality of the transaction.

III.

PETITIONER WILL NOT BE PROSECUTED CRIMINALLY IN THE FEDERAL COURTS IF THE JUDGMENT OF THE STATE COURT IS EXECUTED.

The argument of petitioner that he may be prosecuted criminally in the Federal Courts if the judgment of the State Court is executed is answered by the statements contained heretofore. As a practical matter, it might be added that since there is no evidence of any purchase by petitioner of commodities for more than the ceiling price, and that since the United States District Court, Southern District of California, Northern Division, in the case of *George H. Barnett v. Atlantic Commission Company, Inc.,* 233 Civil (referred to in Transcript of Record, pages 22, 26, 27 and 36) held that the pertinent Office of Price Administration regulations were not intended to be applicable to a sale of growing crops in the field, petitioner's fear of criminal prosecution seems somewhat exaggerated.

CONCLUSION.

Respondents respectfully request that the application for a writ of certiorari be denied.

Dated, Fresno, California,
September 17, 1947.

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